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Rule 9. Pleading Special Matters.

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity. Malice, intent, knowledge and other condition [conditions] of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Allocation of Nonparty Fault; Notice. (1) In an action for personal injury, medical injury, wrongful death, or property damage, a defending party seeking to allocate fault to a nonparty pursuant to Ark. Code Ann. § 16-61-202(c) shall give notice as provided in paragraph (2) of this subdivision. This requirement does not apply with respect to a nonparty who has entered into a settlement agreement with the claimant.

(2) Notice shall be given in the initial responsive pleading, if the factual and legal basis upon which fault can be allocated is then known, or in an amended pleading pursuant to Rule 15 after the party discovers that information. The pleading shall:

(A) sufficiently identify the nonparty to permit service of process, regardless whether service can be made or the court has in personam jurisdiction over the nonparty; and

(B) state in ordinary and concise language facts showing that the nonparty is at fault for the personal injury, medical injury, wrongful death, or property damage alleged by the claimant.

(3) A party served with a pleading that identifies a nonparty pursuant to this subdivision may, within 30 days after service, file an amended pleading pursuant to Rule 15 stating a claim against the nonparty.

(4) A party may not seek to allocate fault to a nonparty pursuant to Rules 49(c) or 52(a)(2) except by compliance with this subdivision (h). This subdivision does not prohibit a party from introducing evidence on any issue..

Comment Text:

Reporter's Notes to Rule 9: - 1. With certain exceptions, Rule 9 substantially follows FRCP 9. Few changes in Arkansas law are effected by this rule. Section (a) requires that any party desiring to raise an issue as to the capacity or authority of a party do so by specific, negative averment. This is closely akin to superseded Ark. Stat. Ann. § 27-1121 (2) (Repl. 1962) which provided that an allegation as to the status of a party was taken as admitted unless specifically denied. While lack of authority or capacity is not treated as an affirmative defense under the Federal Rule, it is analogous to an affirmative defense in that the objection is waived unless specifically asserted. *Summers v. Interstate Tractor & Equipment Co.*, 446 F. 2d 42 (C.C.A. 9th, 1972); *Carver v. Hooker*, 369 F. Supp. 204 (D.C., N.H., 1973).

2. Omitted in Section (a) is the provision found in FRCP 9(a) which requires that capacity or status of a party be alleged when required to show the court's jurisdiction. This provision does not appear to be necessary under Arkansas practice, particularly in view of Rule 8(a)(1) which requires a statement of the grounds upon which venue and jurisdiction depend.

3. Section (b) adds the requirement not found in FRCP 9(b) that duress or undue influence be plead with particularity. This is in keeping with prior Arkansas law. *Jansen v. Blissenbach*, 210 Ark. 22, 193 S.W.2d 814 (1946); *Ledwidge v. Taylor*, 200 Ark. 447, 139 S.W.2d 238 (1940).

4. Section (c) is generally in accord with prior Arkansas law. Superseded Ark. Stat. Ann. § 27-1147 (Repl. 1962) required that in pleading the performance of a condition precedent in a contract, a party need only state generally that he had performed all conditions on his part. This rule is broader in scope and applies to all actions, whether contractual or not. It should have the effect of removing such requirements as pleading notice of breach of warranty as a condition precedent to maintaining such a claim. *L.A. Green Seed Co. of Arkansas v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

5. Section (e) is essentially the same as superseded Ark. Stat. Ann. § 27-1146 (Repl. 1962) and does not affect any changes in Arkansas law.

6. Section (f) provides that the allegations as to time and place are material as opposed to the old common law rule which treated them as immaterial and thus subject to variance at the trial. The purpose of this provision is to enable a party to raise such defenses as statute of limitations and laches based upon dates alleged by the opposing party. See Wright & Miller, *Federal Practice & Procedure*, Section 1308. In short, a party is bound by the dates and places alleged in his pleadings.

7. Section (g) follows the common law rule that special damages must be pleaded specifically. Arkansas has recognized this rule, but has not always adhered to it. *Arkansas Power & Light Co. v. Harper*, 249 Ark. 606, 460 S.W.2d 75 (1970); *Ark-La Gas Co. v. McGaughey Bros., Inc.*, 250 Ark. 1083, 468 S.W.2d 754 (1971). 8. Omitted from Rule 9 is Section (h) of FRCP 9 which deals with admiralty and maritime claims under federal law.

Addition to Reporter's Notes (2014 amendment): New subdivision (h) creates the exclusive procedural mechanism for asserting the right to an allocation of nonparty fault created by Ark. Code Ann. § 16-61-202(c), as amended by Act 1116 of 2013, § 3, or by any other statute. Other states have placed similar provisions in their rules that govern the pleading of special matters. *E.g.*, Mich. Ct. Rule 2.112(k); Utah R. Civ. P. 9(f). Subdivision (h) draws in part on those rules and on section 2 of Act 649 of 2003, codified at Ark. Code Ann. § 16-55-202, which was held unconstitutional on separation-of-powers grounds in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135.

Under subdivision (h), a defendant asserts a contribution claim for allocation of nonparty fault in an answer or amended answer. By contrast, a defendant seeking contribution for damages may bring a third-party claim against a nonparty under Rule 14 or a cross-claim against a co-party under Rule 13. The procedural section of the Uniform Contribution Among Tortfeasors Act, Ark. Code Ann. § 16-61-207, is inconsistent with Rule 9(h) and in some respects with Rules 13 and 14. Therefore, section 16-61-207 is superseded pursuant to Ark. Code Ann. § 16-11-301.

Notice under Rule 9(h) is necessary if a nonparty's fault is to be considered by the trier of fact. See 2014 Amendments to Rules 49 and 52. Under paragraph (h)(1), however, the notice requirement does not apply if a nonparty has settled with the claimant. When there has been a settlement, there is no need for notice in light of Ark. Code Ann. § 16-61-204(d), which provides that "the remaining defendants are entitled to a determination by the finder of fact of the released joint tortfeasor's pro rata share of responsibility for the injured person's damages."

Under paragraph (h)(2), noticed must be given in the defending party's original responsive pleading, if the necessary information is then available, or in an amended or supplemental pleading under Rule 15. Unlike former section 16-55-202, under which notice could be given no later than 120 days before the trial date, paragraph (h)(2) contains no deadline. Although Rule 15 allows amended and supplemental pleadings as a matter of right, the court may, on motion, strike the amended or supplemental pleading or grant a continuance if it determines that "prejudice would result or the disposition of the cause would be unduly delayed."

Paragraph (h)(2)(A) requires that nonparties be identified in sufficient detail to permit service of process, even though service cannot be made and the court lacks in personam jurisdiction.

This requirement guards against the practice of naming so-called "phantom tortfeasors." See *Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785 (Tenn. 2009). Paragraph (2)(B) parallels Ark. R. Civ. P. 8(a) in requiring the same fact pleading necessary in a complaint. The requirement in former section 16-55-202---"a brief statement of the basis for believing the nonparty to be at fault"---was uncertain in scope but well short of the fact-pleading standard.

Paragraph (h)(3) permits any party, within 30 days after being served with a pleading that identifies a nonparty, to amend his or her pleadings to assert a claim against the nonparty. Paragraph (h)(4) makes plain that the procedure set out in subdivision (h) is the exclusive method for allocation of nonparty fault under Rules 49(c) and 52(a)(2). It also emphasizes, as should be clear from the context, that subdivision (h) has nothing whatsoever to do with the admissibility of evidence. For example, defense counsel remain free to introduce evidence of proximate causation with respect to a nonparty in the course of raising the so-called "empty chair" defense.

History Text:

Amended by per curiam order August 7, 2014, effective January 1, 2015.

Associated Court Rules:

Rules of Civil Procedure

Group Title:

III. Pleadings and Motions

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